IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 162 OF 2002

State of Goa through Executive Engineer, Works Division XIII, Irrigation Department, Government of Goa having their office at Junta House, Panaji, Goa. ... Appellant

versus

Smt. Vandana Subhash Salgaonkar, Major, Sole Proprietor and carrying on business in the name and style of M/s Vishal Engineers, Angel Building, 1st floor, behind Shivam Bungalow, Miramar – Goa. ... Respondent

Mr. P. A. Kamat, Government Advocate for the Appellant.

Mr. Nitin Sardessai with Mr. P. Rao, Advocates for the Respondent.

CORAM : B. H. MARLAPALLE &
N. A. BRITTO, JJ.

DATE : 27TH OCTOBER,2004.

ORAL JUDGMENT(PER B.H.MARLAPALLE, J.)

This First Appeal arises from the Judgment and Decree dated 30-8-2001, passed by the learned Civil Judge, Senior Division at Panaji, in Special Civil Suit No.151/92/B.

2. The erstwhile Union Territory of Goa, Daman and Diu under the Union Territory Act, 1963 had invited tenders for construction of Main Canal of S.I.P. from 8.67 kms. to 10.02 kms. vide the Tender Notice dated 23-6-1978 and the said Notice was published in some of the local newspapers on 15-5-1978. The estimated cost of the tender was Rs.12,80,337/- and the last date to receive the tender in the office of the Plaintiff at Pajimol, Sanguem was on or before 18-7-1978. Tenders were to be opened on 13-7-1978. The Defendant was a successful tender and he was purportedly issued Order on 13-10-1978. It is further claimed that on receipt of the work order executed between the Plaintiff and the Defendant the work was to commence on 28-10-1978 and was to be completed on or before 31-1-1980 i.e. within 15 months. The Defendant failed to submit the Bar Chart to the Plaintiff and right from the beginning the progress of work was found to be unsatisfactory. By letter dated 6-1-1979, the Plaintiff had brought to the notice of the Defendant regarding his requirements. The Defendant was paid an amount of Rs.29,550/- and Rs.15,000/- towards R.A. Bills on 22-12-1978 and 16-2-1979. By another letter dated 5-3-1979, it was brought to the notice of the contractor that the progress of work was slow. An amount of Rs.75,668/- was paid to the Defendant towards R.A. Bill No.3 but the contractor failed to expedite the work and in fact when he received the said amount he took no steps to expedite the work. But on 29-10-1981, a final opportunity was given to the Defendant to complete his work and he failed to do so. The Plaintiff, therefore,

isued Notice dated 20-3-1982 under Sub-Clause 3(a), 3(b) and/or 3(c) of the agreement on account of breach of contract informing the contractor that in case no cause was shown within the stipulated period or the cause shown is not to the satisfaction, action would be taken against the Defendant as contemplated under Section 3 of the agreement. This Notice was replied by the Defendant and with an assurance to complete the work expeditiously. As the contractor could not complete the work, another Notice dated 8-4-1982 was also issued. The Plaintiff proceeded to get the balance work done through another contractor by re-inviting tenders for the work which was estimated to be Rs.5,21,352/-. The work undertaken by the contractor was estimated to be of Rs.4,68,920/-. The balance work awarded to Mr. B. Ramana for tendered amount of Rs.8,36,609/- had commenced from 11-11-1983 and it was completed on 10-2-1985. By Notice dated 21-1-1985, the Plaintiff sought to recover an amount of Rs.5,92,510/- from the Defendant and by letter dated 27-2-1985 the Defendant requested the Plaintiff to refer the dispute to an Arbitrator. Another Demand Notice was issued on 15-1-1991 i.e. after formation of the State of Goa. By letter dated 19-3-1991, the Defendant denied her liability and, therefore, the State Government instituted Special Civil Suit No.151 of 1992 for payment of an amount of Rs.13,39,843/- with interest at 18% per annum from the date of filing of the suit till actual payment.

3. The Defendant by a written statement had denied the

claim and submitted that there was no cause of action inasmuch as there was no privacy of contract between the Plaintiff and the Defendant. The Defendant took the plea that the Court had no jurisdiction to entertain the suit. The Defendant also denied to have filed the tender or signed the agreement at Exh.11. The learned trial Court framed issues and held that the Defendant was allotted work order for construction of S.I.P. from 8.67 kms. to 10.02 kms. vide Tender Notice dated 23-6-1978 at the estimated cost of Rs.12,80,337/- and that the Defendant had formed part of the said work. However, the learned trial Court held that the Plaintiff could not prove that the Defendant was liable to pay the Plaintiff an amount of Rs.13,39,843/- along with the interest at 18% per annum. On account of the finding in the negative on the last issue the claim made by the Plaintiff came to be turned down and the suit was dismissed with costs by the impugned Judgment.

4. On behalf of the Plaintiff, P.W.1, S. Shekar and P.W.2, G. B. Kulkarni, Deputy Manager in the State Bank of India were examined. It was contended by the Plaintiff that the original agreement executed between the parties was not traceable and, therefore, he produced a so-called agreement at Exh.11. The document at Exh.11 is not a photostat copy nor is it certified true copy. It is a printed copy of the agreement and it appears to have been signed by the Executive Engineer on 17-7-1978 whereas the tender in the instant case was opened on the next day i.e. 18-7-1978.

It does not carry the signature of the Defendant. No witness has been examined by the Plaintiff to prove this document at Exh.11 and merely because the document was exhibited it cannot be presumed that the contents were proved or that the Defendant had signed the agreement when a plea was raised in the written statement itself that the Defendant had not signed the so-called agreement on the basis of which the claim was made in a Special Civil Suit. The document at Exh.11 could not be, therefore, treated to be as a secondary evidence admissible under Section 61 r/w Sections 64 and 65 of the Evidence Act as has been rightly held by the learned trial Court. When the tender was opened on 18-7-1978, there was no reason for the Executive Engineer to sign the agreement on the earlier date. Witnesses, if any, to the said agreement could have been examined before the learned trial Court and the Plaintiff chose not to do so. There was no evidence even in support of the Plaintiff that the original agreement was not traceable. As per the learned trial Court even an application was not moved by the Plaintiff seeking to bring on record secondary evidence. The Plaintiff also did not prove that the copy of the purported agreement at Exh.11 was a copy of the agreement originally signed and executed between the Plaintiff and the Defendant. It was under these circumstaces, the learned trial Court held that when the recovery claim was based on the agreement at Exh.11 and the said document was not proved, the suit was required to be dismissed. No fault could be found with the view taken by the learned trial Court. The Plaintiff by his own conduct chose not

to place proper evidence oral and documentary before the learned trial Court in support of its claim against the Defendant.

5. In the premises, this appeal fails and the same is hereby dismissed. No costs.

B. H. MARLAPALLE,J.

N. A. BRITTO, J.

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